

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

CANTERBURY PARK CAPITAL L.P.
and CANTERBURY PARK CAPITAL
(U.S.) L.P.,

Plaintiffs,

v.

JOSEPH V.R. MICALLEF, RICO
MICALLEF, VINCENT A.
MICALLEF, and ALLEGRO
CORPORATION,

Defendants.

No. 03:12-cv-01021-HZ

OPINION & ORDER

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HERNANDEZ, District Judge:

Plaintiffs Canterbury Park Capital L.P. and Canterbury Park Capital (U.S.) L.P. brought an action in Multnomah County Circuit Court over a shareholder agreement dispute with Defendants Joseph V.R. Micallef, Rico Micallef, Vincent A. Micallef, and Allegro Corporation. Defendants removed the state action to this court. Plaintiffs now move to remand to state court and request attorney fees for the time spent to bring this motion. Plaintiffs' motion to remand and their request for attorney fees are granted.

BACKGROUND

Plaintiffs are "limited partnership[s] existing and organized under the laws of Canada." Notice of Removal of Action, Ex. 1 at 3. Defendants Joseph V.R. Micallef, Rico Micallef, and Vincent Micallef are all citizens of Oregon. Id. at 3-4. Defendant Allegro Corporation's

principal place of business is in Oregon. Id. at 4. On June 7, 2012, Defendants removed the state action to this court based on diversity jurisdiction. 28 U.S.C. §§ 1332(a), 1441(a).

Plaintiffs timely filed this motion to remand on June 29, 2012.

STANDARDS

If a civil action is removable “solely on the basis of” diversity jurisdiction, the action “may not be removed if any of the . . . defendants [are] citizen[s] of the State in which such action is brought.” 28 U.S.C. § 1441(b)(2). “A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal. . . .” 28 U.S.C. § 1447(c).

DISCUSSION

I. Motion to Remand

Plaintiffs argue that removal is barred by § 1441(b)(2) because Defendants are citizens of Oregon, the forum state. Pls.’ Mem. Supp. Mot. Rem., 3. “Removal based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court.” Lively v. Wild Oats Mkts., Inc., 456 F.3d 933, 940 (9th Cir. 2006). However, when the defendant is a citizen of the forum state such protection becomes unnecessary. Id. Defendants concede that § 1441(b)(2) generally precludes removal if a defendant is a citizen of the forum state. Defs.’ Opp’n Mot. Remand, 8. But Defendants characterize their removal as a “procedural” defect and argue that the court has discretion to overlook the forum defendant rule. Id. at 9. Defendants ask this court to apply its discretion and deny the motion to remand.

“[T]he presence of a local defendant at the time removal is sought bars removal.” Spencer v. U.S. Dist. Court, 393 F.3d 867, 870 (9th Cir. 2004). However, a “violation” of § 1441(b) “constitutes a waivable non-jurisdictional defect subject to the 30-day time limit

imposed by § 1447(c).” Lively, 456 F.3d at 942. In Lively, plaintiff did not move to remand, but the district court remanded *sua sponte*, months after the 30-day time limit had passed. Id. at 935. The court of appeals, found that the district court had exceeded its authority under § 1447(c) and vacated the order to remand. Id. at 942. Here, Plaintiffs objected to the removal within the 30-day time limit. Thus, unlike Lively, Plaintiffs did not waive the “defect” in Defendants’ removal. Defendants’ reliance on Hood Custom Homes, LLC v. Ill. Nat’l Ins. Co., No. 08-1506-JE, 2009 U.S. Dist. LEXIS 32060 (D. Or. Apr. 14, 2009) is also misplaced. In Hood, the court used its discretion to deny the motion to remand that was “based upon minor procedural defects which [were] not cured within the removal period.” Id. at *15 (procedural defect occurred when defendant failed to attach two exhibits in the notice of removal). The defect in Hood did not involve the forum defendant rule. Neither Lively nor Hood are directly applicable to this case. Defendants have not presented any cases that suggests § 1441(b) is discretionary when a plaintiff has timely objected to removal. Plaintiffs’ motion to remand is granted.

II. Attorney Fees

Plaintiffs seek costs and expenses incurred as a result of Defendants’ removal. “An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. § 1447(c). “Absent unusual circumstances, courts may award attorney’s fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.” Gardner v. UICI, 508 F.3d 559, 561 (9th Cir. 2007) (quoting Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005)). “[W]hether a removal is improper is not dispositive in determining whether fees should be awarded under 28

U.S.C. § 1447(c). Rather, the standard for awarding fees . . . turn[s] on the reasonableness of the removal.” Id. at 562 (quotation omitted).

On June 15, 2012, Plaintiffs advised Defendants that removal was improper because of § 1441(b) and requested that Defendants remand the case to state court. Decl. of Matthew P. Kanny Supp. Defs.’ Opp’n (“Kanny Decl.”) Ex. C at 2. Plaintiffs also warned that they would seek fees if “forced to file a motion for remand.” Id. On June 18, 2012, Plaintiffs reiterated their position that Defendants’ removal was improper because of § 1441(b). Decl. of John F. McGrory, Jr. Supp. Pls.’ Reply ¶ 4. On June 20, 2012, Plaintiffs contacted Defendants again to discuss the removal issue. Id. at ¶¶ 5-6. On June 22, 2012, Defendants explained their position on the issue and responded unequivocally that “[Defendants] will not agree to remand the action.” Kanny Decl. Ex. D at 3.

Plaintiffs alerted Defendants to the improper removal before filing their motion to remand. Defendants have not presented any persuasive authority to justify their position on § 1441(b). Therefore, the request for costs and expenses is granted.

CONCLUSION

Plaintiffs’ motion to remand [#10] is granted. This action is remanded to state court and Plaintiff is awarded costs and expenses incurred in the filing of this motion.

IT IS SO ORDERED.

Dated this 25 day of October, 2012.


MARCO A. HERNANDEZ
United States District Judge